



**Mwangigachuma & 2 others v Njagi (Environment and Land Appeal E027 of 2022) [2025] KEELC 5757 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5757 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND APPEAL E027 OF 2022**

**EM WASHE, J**

**JULY 30, 2025**

**BETWEEN**

**HENRY MWANGIGACHUMA ..... 1<sup>ST</sup> APPELLANT**

**MAINGI GACHUMA GACHERU ..... 2<sup>ND</sup> APPELLANT**

**GERALD KARIUKI GACHUMA (LEGAL REPRESENTATIVE OF THE ESTATE OF GACHUMA GACHERU- DECEASED) ..... 3<sup>RD</sup> APPELLANT**

**AND**

**GATIMU LINUS NJAGI ..... RESPONDENT**

**JUDGMENT**

1. The 1<sup>st</sup> to 3<sup>rd</sup> Appellants herein being aggrieved by the Judgement pronounced on the 18.08.2022 in the proceedings known as Eldoret CM ELC Case No. 96 of 2020 (hereinafter referred to as “the Trial Court Judgement”) filed an Amended Memorandum of Appeal dated 10.06.2024 (hereinafter referred to as “the present Appeal”) seeking the following orders; -
  - A. An Order granting the Prayer in the Counter-Claim for eviction of the Respondent from the suit properties known as LR.No. Eldoret Municipality/Block 21 (Kingongo)/670 and 671.
  - B. An Order vacating the reference of the issue of the removal of the caution by the Land Registrar and allowing the prayer for removal of caution based on the evidence on record.
  - C. The Appellants be awarded costs of this Appeal and in the Court below.
  - D. Any further relief the Court may deem fit.
2. The grounds upon which the present Appeal is premised on are as follows; -



- i. The Learned Magistrate erred in fact and in law in dismissing the counter-claim for lack of evidence of trespass despite the respondent having asserted his possession of the land and claiming that it was a matter of right arising from the impugned sale agreements.
  - ii. The Learned Magistrate erred in law in the application of the doctrine of exhaustion of remedies and hence wrongly declined to adjudicate on the prayer for removal of caution despite Section 73(1) of the Land Registration Act providing for immediate and direct right of filing a suit in court without first referring the matter to the Land Registrar.
  - iii. The Learned Magistrate judgment on the Counter-claim was contrary to Article 50(1) of the Constitution of Kenya 2010 which required the court to adjudicate on the dispute before it.
3. The present Appeal was canvassed by way of written submissions with the Appellants filing their submissions dated 28.04.2025 while the Respondent filed his submissions dated 26.05.2025.
  4. The Court sitting as a first Appellate Court is guided on its scope of jurisdiction by the findings made in the case Kenya Ports Authority-Versus- Kuston Kenya Limited (2009) 2 EA 212 where the Court stated as follows: -
 

“This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect...”
  5. The appeal before the Court only deals with the decision of the Trial Court determining the Counter-claim filed by the Appellant.
  6. The Counter-claim is contained in the Statement of Defence and Counter-claim dated 28.04.2020 wherein the Appellants sought the following orders: -
    - i. An order for the removal of caution from Eldoret Municipality/ Block 21 (King’ong’o)671 and 670.
    - ii. General damages for illegal caution.
    - iii. An order of eviction against the plaintiff, his servants and /or agents, livestock and structures from land parcel Nos. Eldoret Municipality/ Block 21 (King’ong’o)671 and 670.
    - iv. General damages for trespass.
    - v. The costs of the counter-claim.
    - vi. Interest.
    - vii. Any further or better relief this court may find just.
  7. The grounds upon which the prayers above are being sought can be summarized as follows: -
    - i. The Appellants claimed that the Respondent had registered a caution over the suit properties without any justification.
    - ii. Based on the registration of the caution against the suit properties, the Appellants have been unable to deal with the property in accordance to their rights.
    - iii. Further to that, the Appellants stated that the Respondent took possession of the suit property without any legal rights and is undertaking various activities to waste the same.



- iv. The Appellant therefore sought this Court to make a declaration that the Respondent had trespassed into the suit properties and should be evicted.
  - v. In addition to the eviction order, the Appellants sought for general damages for the unlawful occupation of the suit properties.
8. The Counter-claim was duly served on the Respondent who filed a Defence to the Counter-Claim dated 14.10.2020.
9. In the defence to the Counter-Claim, the Respondent pleaded as follows: -
- i. The Respondent admitted that the Appellant was the registered owner of suit properties.
  - ii. The Respondent stated that there were two Agreements for Sale dated 15.04.2004 and 19.09.2004 entered with the Appellant for the purchase of the suit properties.
  - iii. Based on the two Agreements for Sale between the parties herein, the Respondent was given consent to enter and occupy the suit properties herein.
  - iv. In other words, the Respondent denied the allegations that he was a trespasser on the suit properties and/or his actions amounted to wastage of the same.
  - v. The Respondent stated that the registration of the caution on the suit properties was to protect his interests before the dispute is resolved.
  - vi. In essence, the Respondent pleaded that the caution registered on the suit properties are legitimate and lawful unless otherwise ordered.
10. The Defence to the Counter-claim was duly served to the Appellant who did not file any reply to the Defence on the Counter-Claim.

### **Respondent's Case**

11. The Respondent herein (who was the Plaintiff before the Trial Court) began his case on 24.05.2022 and was marked as PW1.
12. The Respondent introduced himself as a resident of Mti Moja Area within Eldoret Town.
13. The Respondent stated that he is a lecturer at Eldoret University.
14. The Respondent confirmed to the Trial Court that he had prepared a witness statement dated 29.07.2020 of which he adopted the same as his evidence in chief.
15. The Respondent averred that the Appellant had entered into an Agreement for Sale dated 15.04.2004 for the sale of  $\frac{1}{4}$  of an acre on the suit property known as Eldoret Municipality/Block 21 (king'ong'o)/671 at a consideration of Kshs. 555,000/=.
16. The Respondent informed the Court that he paid a consideration of Kshs. 510,000/= through a Bankers Cheque from Barclays Bank of Kenya and the balance of Kshs. 45,000/= was paid in cash on 30.05.2004.
17. The Respondent then produced the Agreement for Sale dated 15.04.2004 and an Acknowledgement receipt dated 30.05.2004 as Plaintiff Exhibit 1 (a) & (b).
18. In addition to the above Agreement, the Respondent informed the Court that a second Agreement for Sale dated 19.09.2004 was executed between the parties for the purchase of  $\frac{1}{4}$  of an Acre on the



- property known as Eldoret Municipality/Block 21 (King'ong'o)/ 670 for a consideration of Kshs. 500,000/=.
19. The Respondent confirmed that the full purchase price of Kshs. 500,000/= was paid by a cheque.
  20. The Respondent then produced the Agreement for Sale dated 19.09.2004 as Plaintiff Exhibit 2.
  21. The Respondent informed the Trial Court that parcel No. Eldoret Municipality/Block 21 (King'ong'o)/ 671 was  $\frac{1}{2}$  and Acre and that he had purchased  $\frac{1}{4}$  an Acre only.
  22. The  $\frac{1}{4}$  of an Acre on plot No. Eldoret Municipality/Block 21 (King'ong'o)/ 671 was then handed over to the church by the Respondent.
  23. As regards the property L.R. No. Eldoret Municipality/Block 21 (King'ong'o)/ 670, the Respondent was unable to take possession of the  $\frac{1}{4}$  Acre plot he had purchased.
  24. It is on this basis that the Respondent registered a caution on the 04.12.2018 and the Respondent produced a copy of the caution as Plaintiff Exhibit 3.
  25. The Respondent proceeded further and sought for leave to enlarge time within which to file a suit against the Appellant.
  26. Indeed, the Court granted leave and enlarged time within which to file the proceedings against the Appellant and the Order was produced as Plaintiff Exhibit 4.
  27. It is only upon obtaining the leave that the present suit was filed.
  28. The Respondent informed the Court that the Appellant had prepared all the relevant documents for the subdivision and transfer of the portions purchased by the Respondent.
  29. The Respondent then produced a copy of the Application for Consent executed by the Appellant, an official search of the suit properties, a letter from the Chief, a copy of the appellant's ID and the KRA PIN number which were marked as Plaintiff's Exhibits 5 (a) – (e) respectively.
  30. The Respondent also produced the Mutation Form for the suit properties as Plaintiff's Exhibit 6.
  31. Lastly, the Respondent also presented a Demand Notice made to the Appellant which was produced as Plaintiff Exhibit 7.
  32. In conclusion therefore, the Respondent sought for an order of Specific Performance against the Appellant for the execution of the Transfer documents in regards the portions of land he had purchased together with costs of the suit.
  33. On cross-examination, the Respondent reiterated that the portion of  $\frac{1}{4}$  of an Acre purchased within the property known as Eldoret Municipality/Block 21 (King'ong'o)/ 671 is where the church is.
  34. The Respondent stated that the Agreement for Sale dated 15.04.2004 did not indicate the parcel number.
  35. Similarly, the description of the land is Kegongo and not Kaheya as is described in the Agreement for Sale.
  36. The Respondent insisted that the Appellant had collected the cheques but did not have any evidence to confirm that the cheques had been banked.
  37. The Respondent stated that the remaining  $\frac{1}{4}$  on the property known as Eldoret Municipality/Block 21 (King'ong'o)/ 671 had been purchased by one, Bunana Wanyeki.



38. The Respondent insisted that the Land Control Board Application indicated the name of Bunana Wanyeki, although the transfer was to be joint.
39. The Respondent stated that the letter from the Chief did not have the name of the author.
40. The Respondent stated that he had not taken possession of the suit properties and neither had he obtained a Land Control Board consent to ratify the subdivision and transfer.
41. Lastly, the Respondent did not have any evidence confirming any correspondence with the Appellant over the dispute.
42. On re-examination, the Respondent insisted that he had contacted the Appellant with a view of resolving the dispute but it did not bear any fruits.
43. The Respondent insisted that there was a contract with the Appellant for the sale of the portions of land.
44. The Respondent admitted that he had never taken possession of the property known as Eldoret Municipality/Block 21 (King'ong'o)/ 670 and therefore that is the reason he placed the caution.
45. The Respondent stated that the Appellant is the one who failed to attend the Land Control Board to complete the process.
46. At the end of this re-examination, the Respondent was discharged from the witness box.
47. The second Respondent's witness was one Charles Ichira Kivuka who was marked as PW2.
48. PW2 introduced himself as an electrician by profession and a resident of Kahoya within Eldoret Town.
49. PW2 confirmed to the Court that he had recorded a witness statement dated 29.07.2020 of which he adopted as his evidence in chief.
50. PW2 referred to the document produced as Plaintiff Exhibit 1 (a) & (b) and confirmed that he was one of the witnesses in the said agreements.
51. PW2 denied being a witness in the second agreement dated 19.09.2004.
52. On cross-examination, PW2 confirmed that he was the one who wrote the Agreement for Sale dated 15.04.2004.
53. However, PW2 informed the Court that his name or identification card number does not appear on the document.
54. PW2 also confirmed that the parcel number discussed in the Agreement for Sale dated 15.04.2004 is not indicated.
55. On re-examination, PW1 stated that his name appears at the back of the document produced as Plaintiff Exhibit 1 (a).
56. After the end of this brief examination, PW2 was discharged from the witness box and the Respondent to closed their case.

### **Appellant's Case**

57. The Defence case started with the testimony of the Appellant who was marked as DW1.



58. The Appellant confirmed that he had recorded a statement with the advocate which he sought to rely upon.
59. In addition to the statement, the Appellant similarly sought to rely on the Ex-parte Originating Summons dated 11.11.2019 which he produced as Defence Exhibit 1.
60. The Appellant concluded his evidence in chief by praying that the suit be dismissed and an Order be issued for the removal of the caution placed by the Respondent on the suit property.
61. On cross-examination, the Appellant denied knowledge of any Agreement for Sale with the Respondent.
62. The Appellant insisted that he had not sold any land to the Respondent.
63. There was no re-examination and the Appellant was discharged from the witness box and his case closed.
64. Parties then filed their submissions with the Respondent filing his submissions on 17.06.2022 while the Appellant filed his submissions on 22.06.2022.
65. The Court then proceeded to deliver its judgment on 18.08.2022.
66. Based on the above proceedings, the Court wishes to identify the following issues for determination: -
  - Issue No.1 was there any trespass by the respondent on the suit properties known as Eldoret Municipality/Block 21 (King'ong'o)/ 671 and Eldoret Municipality/Block 21 (King'ong'o)/ 670?
  - Issue No.2 was the caution recorded on Plot No. Eldoret Municipality/Block 21 (King'ong'o)/ 670 Justified?
  - Issue No. 3 is the appellant entitled to the prayers sought in the counter-claim?
  - Issue No. 4 is the appellant entitled to the prayers sought in this appeal?
67. The Court having identified the above issues for determination, the same will be discussed as below;
  - Issue No. 1 – was there any trespass by the respondent on the suit properties known as Eldoret Municipality/Block 21 (King'ong'o)/ 671 and Eldoret Municipality/Block 21 (King'ong'o)/ 670
68. The first issue is whether or not the Respondent was in occupation of any portion within the suit properties.
69. If the Respondent was in occupation of any portions within the suit properties, was such an occupation lawful?
70. To begin this discussion, there is an admission by the Respondent that he never took possession of the ¼ Acre plot which was on L.R. No. Eldoret Municipality/Block 21 (King'ong'o)/ 670.
71. Based on this admission, this Court can safely make a finding that the Respondent never entered into the suit property known as Eldoret Municipality/Block 21 (King'ong'o)/ 670.
72. As regards the suit property known as L.R. No. Eldoret Municipality/Block 21 (King'ong'o)/ 671, the Respondent informed the Court that he had taken possession and donated the ¼ of an Acre portion to a church.



73. The Appellant on the other hand did not comment anything as to whether there is a church on the ¼ of an Acre portion on L.R. No. Eldoret Municipality/Block 21 (King'ong'o)/ 671 or not.
74. However, in prayer No. (3) in the Counter-Claim, the Appellant sought for an Order of eviction and general damages.
75. During the hearing, neither the Appellant nor the Respondent provided any documentary evidence to show the nature of occupation, use and/or possession that was on the ground in both suit properties.
76. Nevertheless, Section 107 of the *Evidence Act*, Cap 80 places the burden of proving a fact which the court should rely upon in making its determination on the Appellant.
77. In other words, it was incumbent on the Appellant to produce evidence either documentary or otherwise and demonstrate the nature of occupation, use and /or possession perpetuated by the Respondent on the suit properties against his rights.
78. Unfortunately, that did not happen at the Trial Court.
79. The use of the Ex-parte Originating Summons dated 11.11.2019 did not assist much as it was an application by the Respondent seeking to enlarge time within which he could file suit against the Appellant.
80. In conclusion therefore, this Court makes a finding that there was no evidence tabled before the Trial Court to demonstrate any trespass on the suit properties by the Respondent.
- Issue No. 2 – was the caution recorded on Plot No. Eldoret Municipality/Block 21 (King'ong'o)/ 670 Justified?
81. The second issue relates to the registration of a caution on the suit properties.
82. The Appellant alleges that the Respondent registered a caution on the suit properties.
83. The Appellant is of the view that the cautions recorded by the Respondent on the suit properties are not legitimate and therefore should be removed.
84. The Respondent admits to have recorded a caution on the suit property known as Eldoret Municipality/Block 21 (King'ong'o)/ 670 only.
85. Be as it may, the Appellant is aggrieved by the Trial Court's judgment referring the issue of removing the said caution back to the Land Registrar.
86. The Court has indeed perused the Judgment pronounced on 18.08.2022 by the Trial Court and notes that indeed the issue of the caution was referred back to the Land Registrar on the basis that the Appellant had not exhausted the available remedies within the law.
87. The provisions of Section 73(1) of the *Land Registration Act*, No. 3 of 2012 which states as follows;
- “A caution may be withdrawn by the cautioner or removed by order of the Court or, subject to subsection (2), by order of the Registrar”.
88. The interpretation of the above provision is that a caution can be removed by three methodologies independently and/or separately.
89. In other words, the Appellants had a legitimate expectation that the Court would decide on whether the caution should be removed or not.



90. Although, the Land Registrar has powers to remove a caution, there is no provision that prohibits the Court to make an Order for the removal of a caution.
91. In essence, the Trial Court should have considered whether or not the Caution recorded against the suit properties should be removed or not.
92. To answer this question, it is clear that the Respondent's claim which was contained in the Plaint before the Trial Court was struck out.
93. The Respondent's Plaint having been struck out, there was no interest and/or rights that could have been enforceable based on the two Agreements of Sale that were in dispute.
94. It goes without say that the cautions recorded by the Respondent on the suit properties are therefore without any basis.
95. As such, the Appellant was entitled to an order directing the Land Registrar to remove the said cautions.

Issue No. 3 – is the appellant entitled to the prayers sought in the counter-claim?

96. Based on the findings in Issue no. (1) hereinabove, the Court makes a finding that the Appellant is not entitled to an Order of eviction as there is no trespass done by the Respondent on the suit properties that has been demonstrated to Court.
97. As regards the issue of the caution, this Court based on the finding in Issue no. (2) hereinabove is satisfied that the cautions registered by the Respondent on the suit properties are unwarranted and should be removed.

Issue No. 4 – are the appellants entitled to the prayers sought in this appeal?

98. Based on the determinations made in Issue No. 3, the Court is of the considered view and finding that the Trial Court considered the right facts against the appropriate law in determining the issue of eviction.
99. On the issue of the caution, the Trial Court erred in the interpretation and application of the provisions of Section 73(1) of the [Land Registration Act](#), No. 3 of 2012 by directing the issue of removing the caution back to the Land Registrar yet it had powers to determine the same.
100. On this point only, this appeal succeeds.
101. In other words, the present appeal is a partial success.

### **Conclusion**

102. In conclusion, the Court makes the following orders in determination of the Amended Memorandum of Appeal dated 10.06.2024.
  - A. That an order to the land registrar uasin gishu be and is hereby issued directing him/her to remove and/or delete the caution placed on properties known as Eldoret Municipality/Block 21 (King'ong'o)/ 670 and 671 Forthwith.
  - B. Each party will bear its own costs on this appeal.

**DATED, SIGNED & DELIVERED VIRTUALLY AT ELDORET ELC THIS 30<sup>TH</sup> DAY OF JULY 2025.**

**EMMANUEL.M. WASHE**



JUDGE

In the presence of:

Court Assistant: Brian

Advocates for the Appellants: Mr. Mbuthia

Advocates for the Respondent: Mr. Isiji (N/A)

